SUPREME COURT, U. S.

No. 1147

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROBERT HALPIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States

Your petitioner, Robert Halpin, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 5, 1967.

JUDGMENT AND OPINION OF THE COURT BELOW

On January 5, 1967, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Eastern District of Wisconsin, sentencing petitioner to imprisonment for a period of three years and the payment of a fine of $2,500. The opinion of the Court of Appeals has not yet been reported. It is set forth here as Appendix A.

JURISDICTIONAL STATEMENT

Petitioner was charged by indictment with transporting in interstate commerce fraudulently obtained merchandise whose value exceeded $5,000, in violation of Title 18, United States Code, Section 2314. He was also charged with having conspired with others, in violation of Title 18, United States Code, Section 371, the object of such conspiracy being the said interstate transportation of fraudulently obtained merchandise, and with the additional object of dealing in such merchandise, in violation of Title 18, United States Code, Section 2315.

The United States Court of Appeals affirmed petitioner's conviction in an opinion filed on January 5, 1967 (Appendix A).

A timely petition for rehearing was denied on February 13, 1967.

The jurisdiction of this Court is invoked under the provisions of Title 18, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

In a conspiracy prosecution where an admitted conspirator, A testifies that a proven conspirator, B, told him, out of the defendant's presence, that the defendant had joined

the conspiracy, can that statement by B to A be admitted against the defendant for any purpose where there is no evidence that B's statement to A tended to further the conspiracy, or, is the government entitled to an inference, in the absence of such evidence, that the statement is admissible as to the defendant on the theory it is ". . . important to the common purpose that each member know his partners. . . ?"

Should statements by one conspirator to another be excluded as to an absent defendant, where the statements themselves relate to conspiratorial events which have already transpired, where there is no evidence that such narrative declarations in fact tended to further the conspiracy, or is the government entitled as a matter of law and in the absence of an evidentiary inference that such statement be admitted against the defendant on the theory that it is ". . . important to the common purpose that each member know . . . what had been done?"

STATEMENT OF THE CASE

The government's case rested in great part upon the testimony of James Bishop. According to Bishop, he and Frank Verville obtained a going business in Milwaukee and used its credit to obtain large quantities of merchandise, the suppliers of which were not paid. The merchandise was resold then, to persons alleged to be co-conspirators of Bishop and Verville, located in Detroit and elsewhere (A. 6-19).

Alleged co-conspirator Shubow, according to his employee, witness Rohe, obtained some of the Milwaukee merchandise from Verville. Rohe also testified that Shubow told him he had paid money for the merchandise to "Verville or Halpin" (A. 26-27).

Bishop, who had no conspiratorial dealings with petitioner Halpin, testified that Verville told him that he was taking Halpin in as a partner, when Verville ran short of operating capital (A. 13). The government contended that Halpin obtained a Detroit warehouse with Shubow and employed helpers to unload merchandise which was shipped to Shubow in Detroit.

Petitioner Halpin was indicted with Verville, Bishop, Shubow, Irving Lichterman and Daniel Wigodski for conspiring to commit the substantive offenses of interstate transportation and dealing in merchandise obtained by fraud, and for the commission of a substantive act of transporting such merchandise (A. 2-5).

Petitioner Halpin originally pled guilty, but following appeal to the Court of Appeals for the Seventh Circuit, was granted leave to withdraw such plea. Such also was the case as to defendants Verville and Bishop (A. 1).

Remaining co-defendants were granted a new trial following their conviction, based on the government's knowing use of false testimony against them. Indictments as to such defendants, Shubow among them, were dismissed by the government, with an admission by the government that it lacked proof to convict them.

Verville and Bishop were thereafter tried jointly and convicted. Verville's conviction was reversed, *United States* v. *Verville*, 7 Cir., 355 F.2d 527 (1965).

Petitioner Halpin was tried separately.

• • •

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Erosion of the rules of evidence applicable to conspiracy

In theory, hearsay statements are admissible against absent alleged co-conspirators if made " . . . pursuant to and in furtherance of objectives of the conspiracy alleged in the indictment." *Krulewitch* v. *United States,* 336 U.S. 440, 442-443. But in application, the rule is taken to mean that such statements need only *refer* to the conspiracy, and becomes " . . . little more than a test of relevancy." 72 Harvard Law Rev. 985-986.

If the defense stubbornly insists upon adherence to the strict letter of the rule, glib justifications lie immediately at hand. The very reasonableness of such justifications and the seeming ease with which they stroll upon the legal stage constitute a continuing threat to established principles. Thus in *Krulewitch* v. *United States,* 336 U.S. 440, and in *Grunewald* v. *United States,* 353 U.S. 391, the government urged the seemingly reasonable proposition that any conspiracy is invested with the subsidiary object of frustrating its own detection. The attractiveness of the proposition was emphasized by the fact that this Court had repeatedly to reject it before it withered.

In the case at bar a similarly attractive and similarly fallacious rule has been introduced. The rule as enunciated by the Court of Appeals provides that it tends to further a conspiracy, *i.e.,* is ". . . important to the common purpose that each member know his partners, what each one's part was, and what had been done by each." (Opinion, p. App. 5).

To be sure, the statement has a reasonable ring to it, for it would describe some conspiracies. One of the conspiracies it fails to describe, however, is the one at bar.

Consider the position of the witness Bishop. He was employed by conspirator Verville to perform within an extremely limited area of the conspiracy. His function was to run a Milwaukee store as a "front" (A. 9-11). There was never occasion for him to deal with other alleged conspirators, nor did it tend in the slightest degree to further the conspiracy for him to know what others had done. Yet Bishop was permitted to testify that Verville told him that he, Verville, was taking Halpin into the conspiracy as a partner (A. 13). Verville neither required nor sought Bishop's approval, nor was the information calculated to have the slightest effect upon Bishop's conduct. In short, while Halpin's act of joining the conspiracy might well have furthered it, Verville's narrative to Bishop had no effect whatever. Yet by admitting the evidence of the Verville revelation to Bishop as an act in furtherance, Halpin's membership in the conspiracy was proved and his fate sealed, all without regard to his own acts or declarations.

Bishop was likewise permitted to establish the role of one Jacob Shubow as a conspirator. He did not personally know Shubow. But Verville had told him that Shubow had previously set the conspiracy up (A. 14). Verville's revelation again, was not intended to have any effect whatever upon Bishop's activities, nor could it. It was merely another situation in which it was supremely unimportant (despite the Court of Appeal's rule of law to the contrary) for conspirators to know one another's identity.

But Shubow's conspiratorial role was thus and not otherwise established. One Rohe, Shubow's clerical employee, was accordingly enabled to testify that Shubow had told him *after the fact* that Shubow had made payments to "Verville or Halpin" (A. 26, 29). The Court of Appeals held that it tended to further the conspiracy for Shubow's bookkeeper to learn, after such payments were made, that Halpin had received money during the conspiratorial operation. (Opinion, p. App. 4). Rohe also testified that after the FBI entered the case, either Shubow or an FBI agent [!] told him that Halpin had used the name "Gunther" as his conspiratorial stage name (A. 29). The Court of Appeals held nevertheless, that at a time when the conspiracy had been detected and abandoned, it tended to further the conspiracy for Shubow's bookkeeper to know that Halpin and Gunther were the same person. (Opinion p. App. 5).

It is worthy of consideration that the admission of all of the foregoing matters into evidence finds its ultimate justification in the rule that it is " . . . important to the common purpose that each member know his partners, what each one's part was, and what had been done by each." (Opinion, p. App. 5).

The opinion of the Court of Appeals is unique. For we know of no other that permits an admitted conspirator (Bishop) to testify that a proven conspirator (Verville) told him that a third party (Halpin) has joined a conspiracy started by a fourth party (Shubow) to the end that an innocent fifth party (Rohe) can testify to what the fourth party (Shubow) told him about his previous transactions with the third party (Halpin). All without any evidence whatever that the various after-the-fact declarations

tended to further the conspiracy, and, indeed, in the face of strong implications that such declarations could have had and did have no effect whatever on the attainment of conspiratorial goals.

CONCLUSION.

The recent history of the conspiracy theory of prosecution (as distinguished from the conspiracy theory of criminal liability) contains little to nourish the hope that this newest expansion of the limits of the conspiracy logic will escape the attention of those who cherish easy convictions. The weapon provided by the Court of Appeals is too potent to ignore, too easy to abuse. We urge this Court to grant certiorari.

Respectfully submitted

MELVIN B. LEWIS
F. OLIVER
Attorneys for Petitioner

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 17583 SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1967

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH HALPIN,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

January 3, 1967.

APPENDIX

Before KNOCH, *Chief Judge*, KILEY and CUMMINGS, *Circuit Judges*.

KNOCH, *Chief Judge*. Halpin has appealed from his conviction of knowingly causing the interstate transportation of goods, knowing them to have been taken by fraud, in violation of 18 U.S.C. § 2314 (Count 20 of the indictment) and of conspiring with others to transport interstate and to receive, conceal and dispose of the goods in violation of 18 U.S.C. § 371 and 18 U.S.C. §§ 2314 & 2315 (Count 21). We affirm the conviction.

The twenty-six count indictment charged Halpin in two counts, the conspiracy count joined Halpin, Bishop, McGuigan, Shreve, Verville, Luchtenberg and Wigodsky. On arraignment Halpin, Bishop and Verville pleaded guilty.

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 15533 SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT HALPIN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.

January 5, 1967

Before KNOCH, KILEY AND CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* Halpin has appealed from his conviction of knowingly causing the interstate transportation of goods, knowing them to have been taken by fraud, in violation of 18 U.S.C. § 2314 (Count 20 of the indictment) and of conspiring with others to transport interstate and to receive, conceal and dispose of the goods in violation of 18 U.S.C. § 371 and 18 U.S.C. §§ 2314 & 2315 (Count 21). We affirm the conviction.

The twenty-one-count indictment charged Halpin in two counts. The conspiracy count joined Halpin, Bishop, McGuigan, Shubow, Verville, Lichterman and Wigodski. Originally Halpin, Bishop and Verville pleaded guilty.

McGuigan was dismissed. Lichterman, Shubow and Wigodski were convicted after not-guilty pleas. All convictions were vacated, those of Lichterman, Shubow and Wigodski because of the knowing use of perjury by the government, those of Halpin, Bishop and Verville when on Verville's original appeal the United States Attorney confessed error in that their guilty pleas were induced by promises of light sentences. Bishop and Verville were re-tried on not-guilty pleas, and were convicted. Verville appealed and this court reversed and remanded. *United States v. Verville,* 355 F.2d 527 (7th Cir. 1965). Halpin had been granted a severance and his later trial resulted in the conviction before us.

The substance of the overt acts alleged in the indictment is that in July, 1958, Bishop and Verville bought Scanlon's Radio and Music Shop in Milwaukee, leased warehouse space in that city and purchased in the Scanlon name nearly a half-million dollars of merchandise on credit from approximately 1,300 suppliers in several states; that the merchandise was transported to Detroit, where Shubow and Halpin had rented warehouse space and where Shubow paid for unloading of the goods; that Halpin hired employees to work in the Detroit warehouse he had rented; and that Shubow sold the goods to various purchasers. The suppliers of the goods were not paid and the goods were sold at below-invoice prices.

Halpin's first contention is that the government knowingly used false or intentionally misleading testimony at his trial. Government witness Rohe, Shubow's bookkeeper, testified, over objection, that Shubow told him that $3,700 of the proceeds of sales of the goods was paid to "Verville or Halpin." Rohe had testified at the earlier Verville-

Bishop trial that the money was paid to Verville. He did not then state it was paid to Verville *or Halpin.* The same alleged conflict appeared in Rohe's testimony to two other transactions.

Witness Bellware, president of a finance and loan company in Detroit, testified in the Halpin trial that in September or October, 1958, Halpin made "demand" investments of $7,000 in the loan company, using two checks drawn by alleged co-conspirator Shubow. Asked if Verville was involved, Bellware testified that he did not recall "who exactly made the investment," and that it was a "joint investment" but was credited to Halpin's account. On cross-examination, Bellware said he did not recall who handed the checks for the investment to him. Bellware said he had testified in the Verville case that he "believed" Verville invested in the loan company in September or October, 1958. He recalled that at the Verville trial he had not testified that Halpin had "invested" the checks.

Halpin contends his conviction is rendered void by the conduct of the United States Attorney, who prosecuted both the Verville and Halpin cases, in knowingly using false testimony. He does not specify in which trial the testimony was "false." At the Verville trial, Rohe was asked if he recalled how many cash payments were made to Verville "or others," and the district court said, "Limit your question to Mr. Verville." And when asked whether the checks were paid to Verville, Rohe said Mr. Verville and Mr. Halpin represented the Scanlon Company. Accordingly, we are not persuaded that the testimony of Rohe and Bellware in the Halpin trial comes within the rule voiding convictions for the knowing use of perjured testimony.

Halpin states that declarations of alleged co-conspirators were admitted to prove the conspiracy without proof of the conspiracy's existence *having already been made,* and specifically that the statements of Verville to Bishop and those of Shubow to Rohe out of Halpin's presence were admitted to link Halpin to the conspiracy. But Halpin's claim of error is that the district court, over Halpin's objection, refused to limit these hearsay declarations properly at the time they were admitted, and that the instruction at the end of the testimony was not sufficient protection. He relies upon *Lutwak v. United States,* 344 U.S. 604, 618-19 (1953), and *Delli Paoli v. United States,* 352 U.S. 232 (1957), in support of this claim of error.

There is no requirement that the conspiracy be proved at the trial *before* the declarations are admitted, and the order in which evidence is received is within the court's discretion. *United States v. Sansone,* 231 F.2d 887, 893 (2d Cir.), *cert. denied,* 351 U.S. 987 (1956). The requirements are that there must be evidence of the conspiracy and the individual defendant's participation in it independent of the declarations, that the declarant must be a co-conspirator, and that the statement must be in furtherance of the conspiracy. *Glasser* v. *United States,* 315 U.S. 60, 74 (1942). We think the evidence here stripped of the declarations made with respect to Halpin out of his presence is ample to support the admission of the declarations under these requirements.

There is no merit in the contention that because the hearsay declarations of Verville and Shubow related to past facts, they were not in furtherance of the conspiracy but were "mere gossip." It was in furtherance of the conspiracy that Bishop should know of Halpin's part in the conspiracy, and that Shubow's bookkeeper should know

that Halpin and Grunther were the same person and know who received the proceeds of Shubow's sales of the goods. The declarations were not "mere gossip" but were in furtherance of the conspiracy. The same is true of the narrative statements of Verville to Bishop with respect to what certain conspirators had done. It was important to the common purpose that each member know his partners, what each one's part was and what had been done by each. None of these declarations was inadmissible under *United States v. Nardone*, 106 F.2d 41, 43 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 338 (1939) or *United States v. Guido*, 161 F.2d 492, 495 (3d Cir. 1947).

The district court was not required to place a limitation on the testimony of the declarations each time a declaration was admitted. Halpin's reliance upon *Lutwak v. United States*, 344 U.S. at 618-19, and *Delli Paoli v. United States*, 352 U.S. at 238, for this proposition is misplaced. In those cases there was an immediate need for protecting defendants other than the declarant from prejudice by limiting the admissibility of the declarations. In addition, the legal basis for limitation was apparent, since at the time of admission no further evidence was needed to warrant limitation. At Halpin's trial, these factors were not present. Halpin was the only defendant and the only questions pertaining to admissibility could not be resolved except on the entire record.

The rule claimed by Halpin would unduly hamper the prosecution of conspiracy cases by placing a limitation upon evidence at the time admitted, when on the entire record, it need not be limited at all. In addition, since subsequent evidence showed the existence of the conspiracy and participation in it by the declarant and the de-

fendant, there could be no prejudice to the defendant by reason of the failure of the trial judge to give a useless instruction to the jury.

Halpin relies upon our holding in *United States v. Verville,* 355 F.2d 527 (7th Cir. 1965), to support his claim of reversible error in admission at his trial of bankruptcy records. In *Verville* we reversed because of the admission into evidence against Verville of many documents and orders in an involuntary proceeding against Bishop, under the name of Kelly. Among these was a petition alleging that the bankrupt's assets were in danger of being "lost, destroyed or otherwise disposed of," an order making a finding to that effect, and a list of Bishop's creditors showing claims of nearly $350,000. Verville had no opportunity to cross-examine with respect to any of this.

The records of which Halpin complains were an order adjudging Scanlon's bankruptcy, petitions for employment of experts to appraise and sell Scanlon's personal property, the report of the auctioneer and an order enforcing the sale. These documents contain no damaging allegations or findings prejudicial to Halpin.

We see no merit in the claim of reversible error in the court's overruling the motion for a voir dire examination on the exclusion of "fruit of the poisoned tree" in the form of Bishop's testimony, which Halpin claims came from a statement of his which had previously been suppressed. Halpin's contention rests upon a pre-trial order in the Bishop and Verville trial excluding the suppressed admissions of Halpin, Bishop and Verville. The trial judge who presided over the Bishop-Verville trial presided over the Halpin trial that is before us.

There was no pre-trial conference before Halpin was tried for the purpose of excluding Halpin's admissions or this "fruit." Nor was there any intimation in the colloquy upon the Halpin motion between counsel and the trial judge—who had entered the Bishop-Verville pre-trial order—as to what testimony Bishop might or would give that depended on Halpin's admissions. There is no reference in his brief here to any testimony of Bishop's that is the fruit of Halpin's suppressed admissions. We see no error in the court's ruling that Bishop could testify from his own knowledge, irrespective of the suppressed statements. The reliance on *United States* v. *Nardone*, 308 U.S. 338 (1939) is of no avail. We find no reversible error in the points argued.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

Title 18, Sec. 371 U.S. Code provides in relevant part:

> "If two or more persons conspire . . . to commit any offense against the United States . . . and . . . do any act to effect the object of the conspiracy, each shall be [punished] . . ."

Title 18, Sec. 2314 U.S. Code provides in relevant part:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise . . . of the value of $5,000 or more, knowing the same to have been . . . taken by fraud . . .
>
> "Shall be [punished] . . ."